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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

ALBERT A. LIST,

Petitioner,

*against*

LOUIS C. LERNER, individually and as doing business under the firm name and style of Lerner & Company, and as a Director of Fashion Park, Inc.,

JEROME LEWINE, EDMUND W. FITZGERALD, ARTHUR S. NEUMARK, ROBERT PARKES BARUCH, LEWIS D. RAABIN, E. MILO GREENE, STANLEY HESSE, WALTER CAMPBELL GIBSON, HENRY A. ZOELLER, ROBERT POLLAK, JEROME LEWINE, JR., ALVIN SCHONFELD, ARTHUR MORRIS, GERSON D. LUBLIN, WILLIAM P. GREEN, MORRIS HOFFENBERG, NORMA P. LEWINE, JACOB SCHONFELD, MARINA BARUCH DOYLE, LEO M. C. OLIVER, JULIAN BLASS, FLORENCE S. CLAYTON, HATTIE G. MORRIS and HELEN F. SPOONER, doing business under the firm name and style of H. Hentz & Co., a co-partnership, and WILLIAM P. GREEN, individually,

Respondents,

FASHION PARK, INC., *et al.*,

Defendants.

## RESPONDENT LERNER'S BRIEF IN OPPOSITION

LEONARD I. SCHREIBER,
Attorney for Respondent,
Lerner,
Office and P. O. Address,
22 East 40th Street,
New York 16, New York.

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Albert A. List,

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*against*

Louis C. Lerner, individually and as doing business under the firm name and style of Lerner & Company, and as a Director of Fashion Park, Inc.,

Jerome Lewine, Edmund W. Fitzgerald, Arthur S. Neumark, Robert Parkes Baruch, Lewis D. Raabin, E. Milo Greene, Stanley Hesse, Walter Campbell Gibson, Henry A. Zoeller, Robert Pollak, Jerome Lewine, Jr., Alvin Schonfeld, Arthur Morris, Gerson D. Lubin, William P. Green, Morris Hoffenberg, Norma P. Lewine, Jacob Schonfeld, Marina Baruch Doyle, Leo M. C. Oliver, Julian Blass, Florence S. Clayton, Hattie G. Morris and Helen F. Spooner, doing business under the firm name and style of H. Hentz & Co., a co-partnership, and William P. Green, individually,

Respondents,

Fashion Park, Inc., *et al.*,

Defendants.

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## RESPONDENT LERNER'S BRIEF IN OPPOSITION

### Comment on Petitioner's Statement of the Case

Before attempting, by restatement in depth, to correct (by record reference) petitioner's wishful version of the facts, reference is respectfully directed to the opinion of

the District Judge (6a *et seq.*) which constitutes the findings of fact herein, and to the opinion of the Court of Appeals (279a) which affirmed such findings.

## The Opinions Below

The opinion of the District Judge (6a), which constitutes the findings of fact and conclusions of law required by F. R. Civ. P. 52 (23a), after setting forth the claimed material facts alleged to have been withheld by defendants* and upon the basis of which plaintiff claims the right to recover (14a), held:

> "If plaintiff can establish the alleged facts, show they were unknown to him when he made his sale, and prove that had they been made known to him they would have affected his sale, he must recover." (15a)

The Court below then proceeded to analyze the facts adduced at the trial and concluded:

> "Plaintiff has failed to show the existence of a material fact which, if known to him, would have affected his sale.
>
> "Accordingly, plaintiff has failed to establish by a fair preponderance of the credible evidence either that defendants contravened the Securities and Exchange Act of 1934 or Rule X-10b-5, or that defendants conspired in any way to defraud him.
>
> "In sum, the total evidence adduced upon the trial fails to meet either quantitatively or qualitatively the imperative burden of proof which rests upon plaintiff as to the material allegations set out in this complaint. The complaint is dismissed against the defendants with costs.
>
> "This opinion constitutes findings of fact and conclusions of law as required by F. R. Civ. P. 52." (23a)

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* Here, the respondents.

F. R. Civ. P. 52(a) provides that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

As held in *United States* v. *Jones Beach Auth.*, 255 F. 2d 329 (2d Cir. 1958):

> "The appellate court cannot substitute its judgment for that of the trial court in the absence of clear error."

Accord:

> *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394-5 (1948); rehearing den. 333 U. S. 869;
> *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949);
> *Grindroff* v. *Prince*, 189 F. 2d 897 (2d Cir. 1951).

As held in *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449, 451 (2d Cir. 1951):

> "We accept, as we must, those of the trial judge's inferences of fact which he drew directly from his estimates of the credibility of witnesses whom he observed as they testified in his presence. . . ."

The unanimous opinion of the Court of Appeals (279A), reviewing plaintiff's two-pronged factual contentions, on appeal held:

> "We cannot say that the finding of the trial court was clearly erroneous . . .
>
> . . . . . .
>
> "Here too, the finding of the trial court was not clearly erroneous."

## Facts

The record, upon which were based the opinions below, discloses the following:

On November 17, 1960, plaintiff sold 5,100 shares of Fashion Park to Hentz & Co., as broker (hereinafter "Hentz"), for $18.50 a share (106a—Adm. of Facts 5/31/62, ¶ 17). Hentz, as broker, purchased 400 of these shares for defendant William P. Green and his daughter, 400 for Beaver Associates and 4300 for Lerner (152a-153a—Adm. of Facts 5/31/62, ¶ 20). The shares had been purchased by plaintiff January 29, 1959 for $13.50 a share. Plaintiff's profit was $25,500 (List 183a; Robinson 153a, 161a, 163a; 259a—Hentz Exh. A).

The sale originated November 16, 1960, when plaintiff's broker, Textile Shares Corporation telephoned Hentz, stated he had seen Hentz in the "sheets", and asked if Hentz would buy a block of about 5,000 shares of Fashion Park at $20 (105a—Adm. of Facts 5/31/62, ¶ 12; Robinson 158a-159a; Green 226a).

Hentz replied that it had an order to buy only 400 shares but agreed to try and place the block offered (226a-227a). Said 400-share order was from Beaver Associates (Green 225a-229a). Hentz telephoned Lerner, who said he would not pay more than $17.50 and that he had refused a large block offered at over $19 a share (105a—Adm. of Facts 5/31/62, ¶ 13; Green 227a; Lerner 209a-210a).

The next day and several telephone calls later, a price of $18.50 was agreed upon, and the shares sold (106a—Adm. of Facts 5/31/62, ¶ 17; Green 227a-228a; Robinson 161a). Hentz knew Lerner was a director of Fashion Park (105a—Adm. of Facts 5/31/62, ¶ 14; Green 203a, 238a; Lerner 245a-246a). So, too, did plaintiff and his broker (105a—Adm. of Facts 5/31/62, ¶ 15; List 187a, 198a).

Of the 4,300 shares purchased by Lerner, Lerner—himself a broker—retained 1,163 shares for his own investment account, and promptly resold the remaining 3,137 shares at a small profit ranging from 17¢ to $1.50 a share (106a—Adm. of Facts 5/31/62, ¶ 21; 102a—Lerner Exh. H; Lerner 221a-224a).

In accordance with usual brokerage practice (106a—Adm. of Facts 5/31/62, ¶ 19; Robinson 162a) at the time of the sale, Hentz did not know the name of the seller and Textile Shares Corp. did not know the name of the buyer (106a—Adm. of Facts 5/31/62, ¶ 18; Robinson 49a; Green 238a, 241a). Nor did plaintiff inquire as to the identity of the buyer (108a—Pre-trial order 1/11/63, ¶ 3 (a) 2; List 199a).

Lerner's association with Fashion Park, in brief, had been as follows: On March 23, 1955, Lerner first became a stockholder (Lerner 204a). On May 12, 1960, at the annual stockholders' meeting, Lerner was elected a director (Rosenberg, Jr. 110a-111a). At that time, he and his family owned about 4,200 shares (Lerner 247a-248a). Since 1955, he had been in the sheets bidding for Fashion Park stock (Lerner 62a, 81a-82a). Between October 14, 1960 and November 4, 1960, Lerner's bid price ranged between 15½ and 16 (100a—Pl. Exh. 8). From November 7 through November 14, 1960, Lerner's bid was $16 and his asking price was $18 (*id.*). Lerner's bid was increased on November 15 to $17, and on November 17 to $18 (*id.*).

For at least 6 months prior to the telephone call from Hentz on November 16, 1960, Lerner had had no dealings with Hentz concerning Fashion Park (Lerner 206a) and Lerner had refused offers from two other dealers who had offered a large block at a price in excess of $19 (Lerner 210a; Green 227a).

## Detailed Chronology of Events Preceding the November 17, 1960 Transaction

Early in September, 1960, Abraham Chatman, manager of the Rochester Joint Board, Amalgamated Clothing Workers of America, conferred privately with defendant Rosenberg, Sr. Chatman stated that he wished to take away a substantial number of employees from Fashion Park since there wasn't enough full-time work available, and that he was trying to interest another manufacturer to open in Rochester and use these Fashion Park employees (Chatman 147a; Rosenberg, Jr. 114a-115a). Chatman repeated this to defendant Rosenberg, Jr. on October 4, 1960 (Chatman 147a; Rosenberg, Jr. 114a).

About October 24, 1960, Seligson, an attorney, phoned Rosenberg, Jr. and asked if the Rosenbergs would sell their stock (Seligson 220a-221a; 96a—Pl. Exh. 6). This was done at the request of plaintiff's broker (Seligson 221a), without plaintiff's knowledge (List 187a, 196a, 197a-198a). Rosenberg replied "no". Seligson nevertheless repeated his inquiry by letter (96a—Pl. Exh. 6).

On October 31, 1960, Rosenberg, Jr. wrote Seligson that the Rosenbergs were not interested in selling their stock in Fashion Park or its business, and did not want Seligson to make any efforts in that direction (95a—Pl. Exh. 5). Upon receipt of this information—with which plaintiff does not even claim Lerner was in any way connected—plaintiff claims to have directed his broker (Robinson) to sell his stock (List 195a; Robinson 153a-154a, 168a). Plaintiff had long known that a majority of Fashion Park's stock was owned by management, that the stock was not listed and was not dealt in generally by the public, and that management was unwilling to sell (List 184a, 191a-192a, 194a; Robinson 163a-164a, 165a-169a); he also knew the book value of the Fashion Park stock to be between $50 and $60 per share (List 194a; Robinson 163a). How-

ever, confirmation by Rosenberg, Jr. of management's unwillingness to sell is claimed by plaintiff to have triggered his sell order (Compl. ¶¶ 34, 35; Robinson 153a-154a, 168a; List 195a).

At a November 4, 1960 meeting of the board of directors of Fashion Park, which Lerner attended, Chatman for the first time told the board that he felt that Fashion Park was not providing full employment and so he intended to transfer approximately 300 to 350 (⅓) of the workers to another, undisclosed company. He further stated that he felt new management was essential to Fashion Park; that he (Chatman) knew someone who might buy if there was an interest in selling (Rosenberg, Jr. 118a; 87a—Pl. Exh. 2B; Stevenson 135a-136a). No names, no price was mentioned—although specifically requested (Chatman 149a, 150a-151a; Lerner 208a).

On November 14, 1960 Chatman privately told Rosenberg, Jr. that his prospective purchaser was the Hat Corp. (Rosenberg, Jr. 119a-120a; Chatman 148a, 150a; Stevenson 137a-138a). No one else was present at this meeting; Lerner was not informed thereof. (Chatman 151a; Rosenberg, Jr. 120a-121a.)

On November 16, 1960, Textile Shares telephoned Hentz and offered plaintiff's stock for sale. (105a—Adm. of Facts 5/31/62, ¶ 12.)

On November 17, 1960 Textile Shares sold the 5100 shares to Hentz (as broker) for $18.50 a share (160a—Adm. of Facts 5/31/62, ¶ 17).

At that time Hat Corp. had not even met the principals of Fashion Park; nor had Hat Corp. yet made any offer for the stock of Fashion Park. (107a—Adm. of Facts 5/31/62, ¶ 25.)

On or about November 22, 1960—five days *after* plaintiff's sale of his stock, the *first* exploratory talk was held between Fashion Park and Hat Corp. (Rosenberg, Jr. 121a-

123a; Stevenson 138a-139a). No offer or price was tendered at this meeting (*id.*) Lerner did not attend; nor was he informed thereof (*id.*).

On December 1, 1960—thirteen days *after* plaintiff's sale of his stock—Salesky, President of Hat Corp., came to Rochester. He met with the Rosenbergs and Stevenson, and orally offered $50 a share. The Rosenbergs were reluctant to sell, but agreed to consider the offer (Rosenberg, Jr. 123a-124a; Stevenson 139a-140a).

On December 4, 1960—seventeen days *after* plaintiff's sale of his stock—Rosenberg, Jr. telephoned Salesky and accepted the offer (Rosenberg, Jr. 124a; Stevenson 140a). Rosenberg, Jr. then—*for the first time*—telephoned Lerner and informed him of the deal (Rosenberg, Jr. 124a; Stevenson 141a). This was the first intimation Lerner had of any names, offers, prices or even negotiations for the sale of the Fashion Park stock (Rosenberg, Jr. 124a; Stevenson 141a).

On December 7, 1960 a preliminary agreement was signed (Rosenberg, Jr. 124a; Stevenson 141a; 97a—Pl. Exh. 7). Hat Corp. promptly issued a press release, disclosing the transaction (260a—Hentz Exhs. C, D; Green 233a-234a; Rosenberg, Jr. 124a-125a). On February 3, 1961 a definitive agreement was signed between the majority stockholders of Fashion Park and Hat Corp. (Rosenberg, Jr. 125a; Stevenson 141a; 251a—Lerner Exh. A).

Plaintiff commenced this action Feb. 24, 1961 at the instigation (Robinson 174a-176a; 108a—Pre-trial order 1/11/63, ¶ 3(a) 3; 253a—Lerner Exh. C) of his broker Robinson (of Textile Shares) who admits to a financial interest in any recovery, as a reward for such instigation (Robinson 176a-177a.)

Robinson will charge for his instigation and testimony only if plaintiff wins (Robinson 178a), and will give Seligson 20% *(id.)* of the $5000 Robinson expects (Robinson

177a). Robinson and Seligson had worked closely together (Seligson 222a), had conferred together before this suit was brought *(id.)*, and Seligson has yet to be paid (Robinson 178a).

## Plaintiff's Hindsight

1. At trial, plaintiff professed to have first offered to sell his stock on November 16 or 17, 1960 (List 192a-193a). Yet the record established that plaintiff—at least since June 1, 1960—had actively sought such sale, at the same $20 price asked by Robinson of Green in November (Robinson 159a-160a). Thus:

(a) Robinson—who worked closely with Seligson (Seligson 222a)—told Seligson in May that Robinson's client had 5100 shares to sell at 20 (Robinson 180a; Seligson 214a-215a, 217a-218a). Robinson told Seligson the seller was plaintiff (Seligson 215a-216a, 218a).

(b) Although he first denied seeking a buyer (Seligson 216a-217a, 218a-219a, 222a-223a), Seligson was constrained to admit his efforts—as early as June 1—to sell plaintiff's stock to Sagner (Seligson 217a-218a, 219a; 256a—Exh. E) and Kittay (Seligson 217a-218a; 257a—Lerner Exh. F), and elsewhere (Seligson 223a-224a).

2. Plaintiff claimed he sold his stock in November 1960 only because the Rosenberg, Jr., October 31, 1960 letter to Seligson (95a—Pl. Exh. 5) convinced plaintiff the Rosenbergs would never sell. But the record showed:

(a) Plaintiff was told by Robinson, when plaintiff bought his stock in 1959, that the Rosenbergs were unwilling to sell (Robinson 165a-166a)—though from time to time Robinson, who certainly knew this (Robinson 165a-166a) denied telling plaintiff (Robinson 164a) or could not recall (Robinson 167a). Plaintiff himself was constrained to admit hearing from Robinson, early in 1959, that the

Rosenbergs were unwilling to sell (List 194a; Robinson 165a-166a).

(b) Seligson did not represent plaintiff (List 196a, 198a; Seligson 220a, 221a); nor had they ever met (List 197a-198a; Seligson 220a, 221a). Seligson was just a stranger, representing no one, trying to make a finder's fee (Seligson 219a, 220a, 221a).

(c) Rosenberg, Jr. wanted no part of this meddling stranger (Rosenberg, Jr. 127a). Nor does plaintiff "deal with strangers" (List 197a) who frequently approach him for the very same reason, to make a finder's fee (List 197a). Yet, without even ascertaining whether or not Seligson was a "stranger" to Fashion Park (List 197a-198a), and without himself determining whether the Rosenbergs would be willing to sell (List 196a), plaintiff would have one believe he sold because of reliance on the Rosenberg, Jr. letter to Seligson (95a—Pl. Exh. 5)—*with which letter no connection to Lerner is even claimed by plaintiff.*

3. Undisputed, albeit unwilling testimony shows that plaintiff sold his shares only because he could make a handsome 5 point profit on his 22 month investment. Thus:

(a) Between the time plaintiff bought at 13 in January, 1959 (Robinson 163a) and his sale in November, 1960, the only change in the Fashion Park picture was in the price of the stock—not the earnings, book value, nor the unwillingness of the Rosenbergs to sell (Robinson 167a-170a; Rosenberg, Jr. 117a-118a).

(b) After checking (Robinson 156a-157a) the rising price in the National Quotation Bureau's "sheets" (100a—Pl. Exh. 8), Robinson advised plaintiff "to get out of it at a nice profit" (Robinson 156a), suggesting that plaintiff sell "if he could get five points" (Robinson 161a). Plaintiff agreed, authorizing sale at 18 net (105a—Adm. of Facts 5/31/62, ¶ 11; List 186a).

(c) Although Robinson admitted that usually a broker with a "sell order" calls all the firms listed in the sheets to get the best price (Robinson 181a), he first denied doing so, saying he relied on Hentz (*id.*). Ultimately, Robinson admitted calling two other brokers in the sheets. Rice and Williams (Robinson 182a; 170a—Adm. of Facts 5/31/62, ¶ 9), as well as Caughlin, a broker in the sheets (170a—Adm. of Facts 5/31/62, ¶ 10) who was then director of Fashion Park (Robinson 171a). But Caughlin made no bid for the stock (*id.*).

(d) Plaintiff claims he would not have sold had he known Lerner, a director, was the buyer (List 56a, 59a), nor would he have sold had he known brokers who were directors had been bidding for the stock (List 200a). Yet plaintiff never restricted Robinson in selling, by forbidding sale to a director (List 199a); he didn't think such restriction important (List 201a). Nor did plaintiff ask Robinson to check whether any director was bidding in the sheets (List 200a). Only *price* was specified, not the type of buyer (108a—Pre-trial order 1/11/63, ¶¶ 3(a) 3; List 199a). Robinson vacillated between admitting and denying the importance of the existence of a director's bid in determining whether to sell (Robinson 170a-171a, 172a-173a); Robinson couldn't decide whether he did (Robinson 171a) or did not (Robinson 171a-173a) tell plaintiff directors were bidding. But Robinson was constrained to admit that Robinson knew two directors were bidding (Robinson 170a); that Robinson had offered plaintiff's stock to a broker, Caughlin, who was a director and was bidding (Robinson 171a); that Caughlin made Robinson no bid for the block (*id.*); and that the fact that two directors were bidding did not affect Robinson's judgment to sell—"not at that price" (*id.*). Plaintiff and Robinson each had the objective clear—a five point profit (Robinson 179a; List 186a, 199a).

## The Surrounding Circumstances

The transaction in question was an impersonal one in the public over-the-counter market between two brokers, Textile Shares Corporation and H. Hentz & Co.; there was no direct contact between the principals (106a—Adm. of Facts 5/31/62, ¶¶ 17, 18, 19; Green 238a, 241a; Lerner 210a). Tens of thousands of such transactions occur daily in our public securities markets. But most crucial to this case is the fact that the transaction was finally consummated only as the result of solicitation by plaintiff 105a, 106a—Adm. of Facts 5/31/62, ¶¶ 11, 12, 13, 17). On November 16, 1960 plaintiff's broker called H. Hentz & Co. and solicited the purchase by Hentz of plaintiff's shares (105a—*id.*, ¶ 12). In response to plaintiff's solicitation, Hentz agreed with plaintiff's broker to try to place the shares and, seeking a customer, called Lerner (105a—*id.*, ¶¶ 12, 13), who had been in the sheets bidding for Fashion Park stock since 1955 (Lerner 246a). *Lerner thereupon refused the offered shares* (105a—Adm. of Facts 5/31/62, ¶ 13; Green 227a-228a). Only after several additional telephone calls and further solicitation of Hentz by plaintiff's broker, did Hentz (as broker) the following day purchase 5100 shares at $18.50 per share (106a—Adm. of Facts 5/31/62, ¶ 17; Green 227a-228a). Lerner purchased 4300 of these shares (152a-153a—Adm. of Facts 5/31/62, ¶ 20). What did Lerner then do with these 4300 shares? He retained only 1163 shares for his own account and promptly resold the balance of 3137 shares at a small profit (about $1 per share) to a variety of people including a publicly owned investment company in which he was a minority holder and a number of general accounts of customers' men in Lerner's office (106a—Adm. of Facts 5/31/62, ¶ 21; Lerner 211a-214a; 102a—Lerner Exh. H).

(If Lerner had had knowledge of a material fact which assured him a profit, is it likely that he would have resold

almost 75% of the shares purchase, for a mere $1 per share brokerage profit?)

These facts hardly substantiate an allegation that Lerner's "act, practice, or course of business" operated as a "fraud or deceit". A particularly strong showing of fraud is required in a case involving an impersonal transaction in the public over-the-counter market. See Daun and Phillips, *The Implications of Cady Roberts*, 17 Bus. Law. 939, 958 (1962). Of further, crucial importance to determination of whether fraud was practiced is the question of who initiated and solicited the transaction. As already demonstrated, Lerner's role was a passive one. *He* did not initiate or solicit this purchase. Lerner in fact initially refused the offered shares and was persuaded to make the purchase only after plaintiff's intensive selling efforts. Moreover, Lerner's immediate disposition, at a very small profit, of almost ¾ of the shares acquired by him is hardly consistent with a pattern of "fraud or deceit" on his part. The plaintiff in this case, Mr. Albert List, is a well-known financier who has invested in securities for 30 years, is president of a large corporation listed on the New York Stock Exchange, and is an experienced member of the financial community (List 187a-191a; 201a-203a; 254a—Lerner Exh. D). As the Court of Appeals for the Seventh Circuit has recently held, the business sophistication of a seller claiming fraud under Rule X-10B-5 is a most significant factor in determining whether defendant practiced fraud upon the seller. *Kohler* v. *Kohler Co.*, CCH Fed. Sec. L. Rep. pars. 91,243, page 94118 (7th Cir. 1963). It is hardly possible to imagine a person with greater business sophistication than Albert List (See Barron's, August 5, 1963, p. 3, *Midas Touch? Albert List Apparently Can Make Money from Anthracite or Almost Anything Else,* 254a—Lerner Exh. D). Is it likely that he would have failed to make due inquiry as to the material facts, before ordering his stock sold?

## The Buyer's Identity

The usual practice among securities brokers is not to reveal the names of their customers to other brokers with whom they deal (106a—Adm. of Facts 5/31/62, ¶ 19). Robinson, who has acted for plaintiff on a number of occasions over the past 17 years (Robinson 45a-46a, 153a), testified that he has never violated this rule (Robinson 162a), and Robinson has been a broker since 1919 (*id.*). Plaintiff himself did not ask the identity of the buyer (108a—Pre-trial order 1/11/63, ¶ 3(a)3); nor whether he was an officer or director of Fashion Park (108a—Pre-trial order 1/11/63, ¶ 3(a)2; Robinson 173a-174a); nor had he asked the seller's name when he first bought the stock (108a—Pre-trial order 1/11/63, ¶ 3(a)1; List 192a; Robinson 162a). Clearly, plaintiff did not consider such information to be material.

## Reasons for Denying the Writ

1. The decision of the District Court, was based on findings of fact adverse to plaintiff; such findings were sustained by the Court of Appeals, and do not warrant review.

2. The decisions below do not conflict with the decision of this Court in *SEC* v. *Capital Gains*, 375 U. S. 180 (1963), nor with *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951) and *Strong* v. *Repide*, 213 U. S. 419 (1908). The latter two cases are fully discussed in the opinions below. The *Capital Gains* decision—where an injunction was sought under similar provisions of the Investment Advisors Act of 1940—concerned an active misrepresentation; the investment advisor, while recommending stocks for purchase by his clients, concealed his personal recent purchase of such securities, for profitable resale when the clients' later purchases would cause a price rise (a practice known

as "scalping"). The Court of Appeals properly distinguished this decision as an administrative proceeding designed to deter misconduct, unlike a personal claim for damages.

## CONCLUSION

The decisions below were predicated upon findings of fact amply supported by the record. There is here presented no question of law warranting review by this Court. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

LEONARD I. SCHREIBER,
Attorney for Respondent Lerner.